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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 28-990002
Controlled Substance Excise Tax
For The Tax Periods: 1993

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

Controlled Substance Excise Tax - Possession

Authority: IC 6-7-3-5, IC 6-8.1-5-1(b), (c), Clifft v. Indiana Department of State Revenue, 660 N.E.2d 310 (1995), Bryant v. State of Indiana, 660 N.E.2d 290 (1995), Reffett v. State of Indiana, 571 N.E.2d 1227 (1991), Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed. 767 (1994), Ex Parte Lange, 18 Wall. 163, 85 U.S. 163, 21 L.Ed. 872 (1873).

The taxpayer protests assessment of controlled substance excise tax.

STATEMENT OF FACTS

On September 10, 1993, Taxpayer was arrested after a search warrant was served and One Hundred and Forty and Eight/Tenths (140.8) grams of marijuana was found at his residence which he shared with his girlfriend. On September 15, 1993, Taxpayer was charged with Count I, Possession of Marijuana; Count II, Failure to Pay Controlled Substance Excise Tax (CSET); and Count III, Maintaining a Common Nuisance. The Department issued the taxpayer a Controlled Substance Excise Tax (CSET) jeopardy assessment and demand on October 5, 1993. On February 22, 1994, the Taxpayer entered into a Plea Agreement where the original charges were dismissed (with prejudice) and an amended charge of Possession of Marijuana was pled guilty to.

More facts will be provided as necessary.

DISCUSSION

Indiana Code 6-7-3-5 states:

> The controlled substance excise tax is imposed on controlled substances that are:
>
> (1) delivered,
> (2) possessed; or
> (3) manufactured;
>
> in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852.

Pursuant to IC 6-8.1-5-1(b), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

The taxpayer argues that since he has served his criminal sanctions, the controlled substance excise tax (CSET) assessment violates the double jeopardy clause of the United States Constitution. U.S. Const. amend. V. (*See also* Ind. Const. art. I, Sec. 14). The double jeopardy clause protects, among other things, a person from being put in jeopardy more than once for the same offense. Our Supreme Court has held that the CSET assessment is considered jeopardy under Constitutional analysis, and that the jeopardy attaches when the assessment is served on the taxpayer. Bryant v. Indiana Department of State Revenue, 660 N.E.2d 290 (Ind. 1995); Clifft v. Indiana Department of State Revenue, 660 N.E.2d 310 (Ind. 1995).

Taxpayer was presented with the Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand on October 5, 1993. Pursuant to records provided by the taxpayer, a plea agreement was accepted on February 22, 1994. The Department finds, in accordance with the law as stated in Clifft, that the tax assessment and jeopardy came first in time and were not barred by the principles of double jeopardy. In this case, the Department's assessment came before the taxpayer's plea agreement.

The Taxpayer concedes that the Department's jeopardy attached first, however argues that the United States Supreme Court addressed the issue when the second jeopardy was satisfied by one of the alternative penalties but the first was still outstanding in Ex. Parte Lange, 18 Wall. 163, 85 U.S. 163, 21 L.Ed. 872 (1873). In Ex Parte Lange, the defendant was convicted of stealing mail bags, a federal offense punishable by either a two hundred dollar fine or a one year prison term. The trial court sentenced Lange to both the fine and the prison term. The defendant paid the fine and spent five days in prison before seeking a writ of habeas corpus from the court. The judge then vacated the fine and sentenced the defendant to one year imprisonment from that date.

However, Ex Parte Lange involves alternative punishments within the same statute in which the defendant was sentenced by the judge to both punishments at the same time. Here, the CSET attached prior to making the plea agreement and was not the result of alternative punishments from the same statute. Therefore, the plea agreement could not be an adequate satisfaction because it was invalid on the basis that it was the second jeopardy. In addition, the Taxpayer

states in his written argument: "Normally, when the first jeopardy attaches, the second proceeding is null and void as reflected in Dept of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed. 767 (1994)."

The Taxpayer also contends the State cannot revoke acceptance of the plea agreement once it has been accepted and relies on Reffett v. State of Indiana, 571 N.E.2d 1227 (Ind. 1991). In Reffett, the trial court approved a plea agreement and found the defendant guilty of operating a motor vehicle while intoxicated without first ordering and reviewing the pre-sentence report. After reviewing the report they then attempted to revoke acceptance of the agreement. The Indiana Supreme Court found the trial court was bound by that agreement.

However, in this case, the Department cannot be bound by the plea agreement because it is not a party to it. In the case the Taxpayer cites, the trial court was a party. Pursuant to IC § 33-3-5-2 (1993), "The tax court has exclusive jurisdiction over any case that arises under the tax laws of this state". Therefore, even if the plea agreement had not been the second jeopardy, it would not have been binding for the CSET because of lack of jurisdiction.

FINDING

The taxpayer's protest is denied.